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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 131

SCOTT F. KITTREDGE,

Petitioner,

vs.

FRANK H. STEVENS, AMERICAN SURETY COM-
PANY, ALBERT R. MacKUSICK, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.

SCOTT F. KITTREDGE,

Pro se.

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SCOTT F. KITTREDGE,

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vs.

FRANK H. STEVENS, AMERICAN SURETY COMPANY, ALBERT R. MACKUSICK, FIDELITY & DEPOSIT COMPANY, LOUIS L. GREEN, GLOBE INDEMNITY COMPANY AND ÆTNA CASUALTY & SURETY COMPANY.

**PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIRST CIRCUIT.**

Petition for Writ of Certiorari.

Comes now Petitioner and prays for the issuance of a Writ of Certiorari to review a Judgment of the United States Circuit Court of Appeals for the First Circuit.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240A of the Judicial Code, as amended by the Act of February 13, 1935. (28 U. S. C. A., Section 347A.)

Judgment Below.

The Judgment below was entered March 10, 1942 (R. 58).

Statement.

The broad question is presented whether the District Court was right in dismissing, on the ground of lack of jurisdiction over the subject matter, a Complaint against the administrator, guardian and other fiduciaries of an estate appointed by a State Court. (Opinion Dist. Ct. 32-41.) The dismissal below was affirmed by the Circuit Court of Appeals (Op. C. C. A., R. 51-57).

The suit was filed by the successor in interest to the rights of the widow of the decedent. The District Court and the Court below construed the Complaint as requesting the Court:

1. To hold the defendants personally liable to the plaintiff because they withheld property rightfully belonging to the plaintiff and to her predecessor.
2. To order the defendants to turn over to the plaintiff property which they received in their fiduciary capacities and to which plaintiff is now entitled.
3. To order an accounting with respect to both aspects of the relief requested (R. 53).

The District Court, entertaining a "speaking" Motion to Dismiss relative to the question of jurisdiction, dismissed the suit for lack of jurisdiction over the subject matter. It held that as to the defendant Stevens, the administrator d.b.n.c.t.a. of the estate of George H. Shapley, appointed by the Probate Court of Middlesex County, Massachusetts, a Federal Court was without jurisdiction to entertain a Complaint for an Accounting (R. 34). This was held as a matter of law on the basis of the following cases:

Case of Broderick's Will, 21 Wall. 503;
O'Callaghan v. O'Brien, 199 U. S. 89;
Waterman v. Canal-Louisiana Bank & Trust Co., 215
 U. S. 33;
Sutton v. English, 246 U. S. 199;
Wells v. Helms, 105 F. (2d) 402;
Carstensen v. U. S. Fidelity & Guaranty Co., 27 F. (2d)
 11. (R. 35.)

A further ground was the fact that Stevens had, prior to the filing of the present suit, filed a series of accounts and a final account in the State Probate Court. The Court below held that the allowance of this Final Account showing no estate in the hands of the Administrator made the present suit *res judicata* and prevented collateral attack in the Federal Court. The District Court relied upon the following authorities:

Christianson v. King County, 239 U. S. 356, 365.
Montgomery v. Gilbert, 77 F. (2d) 39.
Wells v. Helms, 105 F. (2d) 402.
Clarke v. Andover, 207 Mass. 91.
Allen v. Puritan Trust Co., 211 Mass. 409. (R. 36.)

Hence, the Court held that neither the Administrator nor his surety could be held. (R. 36.) By similar reasoning the Court held it was without jurisdiction as to the defendant MacKusick, Trustee, and the defendant, Green, Guardian, and their respective sureties. (R. 37.)

The District Court held that there were no allegations of fraud in the Complaint but that even if the Complaint could be amended as suggested by plaintiffs to introduce such allegations of fraud, still the Federal Court would have no jurisdiction on the ground that the impeachment of a decree of the Probate Court must, under Massachusetts Statutes,

(Sec. 24, Chap. 206, Acts of 1938, Chap. 154, Sec. 1) be by Petition to reopen the case and modify the original Decree of the Probate Court.

The Circuit Court of Appeals in affirming stated:

1. That in dealing with the question of jurisdiction of suits against executors, administrators, etc., federal court decisions "seem inconsistent and the language confusing." The Court said:

"It might be argued that the effect of recent Supreme Court cases indicates that a federal court has jurisdiction over an action against a fiduciary so long as the court is not requested to give a decree in *rem* immediately affecting property subject to the jurisdiction of a state probate court. *Waterman v. Canal-Louisiana Bank*, 215 U. S. 33 (1909); *Sutton v. English*, 246 U. S. 199 (1918); *Commonwealth Trust Co. v. Bradford*, 297 U. S. 613 (1936); *Princess Lida v. Thompson*, 305 U. S. 456 (1938)."

As to *Waterman v. Canal-Louisiana Bank*, 215 U. S. 33, the Court below analyzed this Court's decision to hold that a suit against an executor for a lapsed legacy, a share of the residue resulting from the lapse, and an accounting could be maintained (except as to the accounting) on the theory that it was a suit *in personam* without any effort to obtain the *res*.

As to *Commonwealth Trust Co. v. Bradford*, 297 U. S. 613, this Court's decision was interpreted to mean that a suit for an accounting against a trustee could be maintained where it was *in personam* with no attempt to interfere with the *res*. The Court below said:

"This case would appear to be authority for the position taken here by the plaintiff." (R. 54.)

The Court below concludes that there is no way to harmonize:

Waterman v. Canal Louisiana Bank, 215 U. S. 33,
Commonwealth Trust Co. v. Bradford, 297 U. S. 613,

as to that kind of an accounting designed to ascertain property transactions as distinguished from an accounting to include an Order of disposition of specific property (R. 55).

The Court below after remarking that this Court's holding in *Princess Lida v. Thompson*, 305 U. S. 456, is not clear (R. 56), yet concludes that

"Although there is some language in the cases supporting the argument made by the plaintiff" (R. 57)

a federal court has no jurisdiction where the "contentions" are solely as to administration, (R. 57) even though the relief asked for would not affect the *res*. The Court below concludes

"If the issues presented by the Complainant involve a consideration of the actual handling of the trust property by the fiduciaries, then the federal courts would appear to have no jurisdiction. *Princess Lida v. Thompson*, *supra*; *Robinson v. Georgia Savings Bank & Trust Co.*, 106 F. (2d) 944 (C. C. A. 5th, 1939)."

The Court admits that *contra* is:

Booth v. Merchants National Bank, 100 F. (2d) 478, (C. C. A. 5th, 1938), (R. 57).

On the basis of the above the Court below affirmed the dismissal by the District Court. (R. 58.)

Questions Presented.

1. Whether a suit against a discharged Probate Court Administrator not based on fraud but capable of amendment to allege after discovered fraud (R. 40) and entirely *in personam*, without any attempt to proceed against the *res* is outside of the jurisdiction of a federal court.

2. Whether a suit *in personam* against a Trustee of an estate alleging

- (a) Discrepancies in receipts. (R. 4.)
- (b) Illegal payments to defendant Green instead of to plaintiff's predecessor in interest.
- (c) Withholding payments to plaintiff by defendant MacKusick, including income. (R. 4.)
- (d) Receipts by defendant MacKusick for which no accounting has been had.
- (e) Withholding physical assets by defendant MacKusick.

is beyond the jurisdiction of a federal court.

Reasons for Allowance of the Writ.

The averments of the Complaint, taken as a whole, show fraud and dereliction of duty on the part of an administrator, a trustee, and a guardian. (See Compl. R. 3-7.) The District Court dismissed the Complaint either as it stood or as capable of being amended to allege fraud. (R. 40.) The Complaint alleges that the basis of the suit was discovered subsequent to the final account of the various fiduciaries. Bearing in mind the suit was *in personam* without any attempt to reach the *res* in the possession of the State Court the question arises whether the suit could be maintained within the meaning of this Court's decisions in *Waterman v. Canal Louisiana Bank*, 215 U. S. 33, *Commonwealth Trust Co. v. Bradford*, 297 U. S. 613 and *Princess Lida v. Thompson*, 305 U. S. 456, and likewise with reference to *Booth v. Merchants National Bank*, 100 F. (2d) 478, cited contra by the Court below. (R. 57.)

As Rule 15a of the Rules of Civil Procedure requires the trial court freely to permit amendments where justice so

requires, the question arises whether this Court's decisions in the above cited cases are so clear as to require the trial court to dismiss, on the basis of lack of jurisdiction, the suit herein. In this connection the doubt as to the applicability of this Court's decisions in the above cited cases expressed by the Court below should be considered.

Robinson v. Georgia Savings Bank & Trust Co., 106 F. (2d) 944 (C. C. A. 5th, 1939).

Booth v. Merchants National Bank, 100 F. (2d) 478 (C. C. A. 5th, 1938).

On principle, it is felt that whatever the provision of Massachusetts Statutes (See Op. Dist. Ct., R. 40) to the effect that the only remedy is to file a Petition to reopen the case and modify the decree of the Probate Court (R. 40) such provisions do not cut down the traditional federal equity jurisdiction.

Pusey and Jones Co. v. Hanssen, 261 U. S. 491.

Waterman v. Canal Louisiana Bank, 215 U. S. 33.

If, therefore, any equitable claim *in personam* was alleged or could be alleged under a skeleton suit (see Justice Clark, Cleveland Institute on Federal Procedure, page 283) against the fiduciaries named defendants herein it follows the Court below had jurisdiction of the subject matter.

Conclusion.

The Petition should be granted and the Judgment below should be reversed.

SCOTT F. KITTREDGE,
Petitioner, pro se.

JUL 25 1942

CHARLES ELMOORE CROPLEY
CLERK

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In the

Supreme Court of the United States.

OCTOBER TERM, 1942.

No. 131.

SCOTT F. KITTREDGE, Petitioner,

v.

**FRANK H. STEVENS, AMERICAN SURETY COMPANY
OF NEW YORK, ALBERT R. MacKUSICK, FIDELITY &
DEPOSIT COMPANY OF MARYLAND, LOUIS L. GREEN,
GLOBE INDEMNITY COMPANY, and AETNA CASUALTY
& SURETY COMPANY, Respondents.**

BRIEF FOR THE RESPONDENTS

ON PETITION FOR WRIT OF CERTIORARI

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**SCOTT F. KITTREDGE,
PETITIONER,**

v.

**FRANK H. STEVENS, ET ALS.,
RESPONDENTS.**

**BRIEF FOR THE RESPONDENTS
ON PETITION FOR CERTIORARI.**

I. REFERENCE TO OPINIONS BELOW.

The opinion of the Circuit Court of Appeals for the First Circuit (R. 51) was reported in 126 F. (2d) 263, and the decision of the United States District Court for the District of Massachusetts (R. 32) was reported in 37 F. Supp. 488.

2. QUESTION PRESENTED.

The basic question presented is whether certiorari should be granted to determine whether the United States District Court was right in declining to take jurisdiction of a complaint, brought by a citizen of Maine against fiduciaries appointed by probate courts of Massachusetts, seeking an accounting and other relief incidental thereto with respect to disposal of assets which came into their possession in their fiduciary capacities.

3. STATEMENT OF FACTS.

The original plaintiff, Marie L. Ellis, a resident of Maine, now deceased, based her right to maintain the action upon the fact that she was one of the heirs at law and next of kin of a Sarah C. Shapley, a resident of Massachusetts, who died intestate in 1932 (R. 2). Relief was sought against

the respondent Stevens with respect to his disposal as administrator *de bonis non* with the will annexed of assets of the estate of George H. Shapley, who died in 1909 a resident of Massachusetts (R. 2). Stevens was appointed by the Probate Court for Middlesex County after the death of George H. Shapley's executor, who died before the estate had been fully administered (R. 2, 14). Sarah C. Shapley, the widow of said George H. Shapley, having waived the provisions of his will, became entitled to ten thousand dollars (\$10,000) out of the estate and a life interest in the excess, above that amount, of the share to which she would have been entitled had the testator died intestate (R. 16-17). The respondent MacKusick was appointed statutory trustee by the same probate court to take over from Stevens and hold in trust for the widow that portion of the estate in which the widow had a statutory life interest (R. 17). The respondent Green was appointed by the same probate court temporary guardian of Mrs. Shapley, also administrator of her estate, and, by the Probate Court of Norfolk County, as administrator *de bonis non* of the estate of Abram Bromade, who was Mrs. Shapley's grandfather (R. 22-27). Sureties upon the probate bonds, in statutory form, of these three fiduciaries were joined as parties defendant (R. 2). All respondents filed motions to dismiss for lack of jurisdiction over the subject matter (R. 10, 32). In support of these motions affidavits supported by duly authenticated copies of probate records were filed by several defendants (R. 14-31), from which it appears that each of the several fiduciaries filed accounts in the probate court which appointed him, including final accounts, showing proper disposition of all the assets which came into his hands in his fiduciary capacity and final distribution. All of said accounts of the individual respondents and also of the deceased executor of the will of George H. Shapley were allowed by decrees after notice to all parties interested and after hearings (R. 14-31, Opinion, R. 36, 38, 39, 40).

4. ARGUMENT.

Nowhere in this complaint for an accounting is there an allegation that the basis of the suit was discovered subsequent to the final accounts of the various fiduciaries. The statement of the petitioner (Pet. Brief p. 6) that this was alleged is erroneous. There is no allegation that the claims put forth by Marie L. Ellis in the complaint were not fully considered and passed upon in the probate accounting of the successive fiduciaries or that the rights and interests of Sarah C. Shapley and those interested in her estate were not properly safe-guarded. No amendment to the complaint was filed or offered in the proceedings below.

Recent decisions of the Supreme Court of the United States cited and relied upon by the courts below have made clear that diversity of citizenship does not confer upon Federal courts jurisdiction of accountings of fiduciaries appointed by a probate court having exclusive jurisdiction of the disposal of the property to be accounted for.

Waterman v. Canal-Louisiana Bank & Trust Co.,
215 U.S. 33.

Princess Lida v. Thompson, 305 U.S. 456.

The case of *Commonwealth Trust Company v. Bradford*, 297 U.S. 613, which the petitioner claims is in conflict, was a suit brought by a receiver of a national bank wherein the receiver sought to establish rights in a trust created by the defunct national bank and there was no question of probate accounting involved.

A review by this court on certiorari of the action of the Circuit Court of Appeals affirming the judgment of dismissal by the District Court would not settle any real conflict between the Federal courts of different circuits. The two decisions of the Circuit Court of Appeals of the Fifth Circuit, cited on page 7 of petitioner's brief, are not in conflict with each other or with the decision of the court below. All three decisions reiterate the principle that the

Federal court does not have jurisdiction over a probate accounting by a fiduciary appointed by a state probate court.

From an examination of the opinion of the judge of the District Court (R. 32-41) who had before him the affidavits filed by the respondents supported by duly authenticated copies of their probate accounts and the probate records, all of which are part of the record which went to the Circuit Court of Appeals, it is clear that the decision of the District Court was in accordance with established Federal law in holding that the Federal court is without jurisdiction to entertain an action which involves collateral attack on decrees of a state probate court and contemplates reopening, revising and reviewing final decrees of that court upon accounts rendered by fiduciaries appointed by that court.

Respectfully submitted,

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